R MEYYANATHAN RETNASAMY v. DEWAN BANDARAYA KUALA LUMPUR

HIGH COURT MALAYA, KUALA LUMPUR
ROZ MAWAR ROZAIN JC
[CIVIL CASE NO: WA-21NCvC-116-07-2021]
12 OCTOBER 2023

Abstract – *A landowner has the legal rights to enjoy his land. The existence of a structure, in this case, monsoon drain, on the landowner's land, would affect his legal rights. Although the monsoon drain is part of a drainage system necessary to prevent any catastrophes such as flash floods, the local authority statutorily responsible for the maintenance of the same is not immune from tortious liabilities. Hence, the existence of the monsoon drain on the landowner's land and entry by local authority on the land for purposes of carrying out maintenance works pertaining to the monsoon drain amounted to encroachment and trespass to the land. More so, where the mandatory notice requirement to landowners under the Street, Drainage and Building Act 1974 is not complied with.*

LAND LAW: *Trespass – Encroachment on land – Monsoon drain located on landowner's land – Whether existed long before land acquired by landowner – Whether permanent structure – Whether monsoon drain encroached on land without landowner's permission – Whether under purview and jurisdiction of local authority – Whether local authority responsible for maintenance and surveillance of monsoon drain – Whether entering on landowner's land to carry out maintenance works amounted to trespass – Whether reasonable notice given to landowner – Whether failure to give reasonable notice defeated defence of justification*

LOCAL GOVERNMENT: *Local authority – Duties of local authority – Monsoon drain located on landowner's land – Whether encroached on land without landowner's permission – Whether under purview and jurisdiction of local authority – Whether local authority responsible for maintenance and surveillance of monsoon drain – Whether reasonable notice to landowner mandatory before entry to land to carry out statutory duties – Whether reasonable notice given to landowner – Whether entry on land without notice amounted to trespass – Whether failure to give reasonable notice defeated defence of justification – Whether local authority ought to acquire portion of land encroached on as remedy and to preserve public interest*

The plaintiff, the owner of Lot No 9891, Mukim Petaling, Daerah Kuala Lumpur, initiated the action against the defendant for trespass and encroachment. The plaintiff claimed that the defendant had constructed a monsoon drain on his land without his permission to enter and build on his land, thus, affecting his legal rights to enjoy his land. The land had become smaller than originally purchased. Despite repeated requests by the plaintiff

A to move the structure built on his land, the defendant had failed to resolve the problem. The structure that had encroached upon his land and continuous trespass onto the plaintiff's land for the maintenance and improvement works on the monsoon drain had resulted in loss and damages to plaintiff. The plaintiff thus prayed for a declaration that the defendant had trespassed onto B his land and that there had been encroachment unto his land in the form of the monsoon drain. The plaintiff sought a mandatory injunction to order the defendant to remove the structure of the monsoon drain from his land and alternatively, to compel the defendant to purchase the part of land taken for the said structure of the monsoon drain at the prevailing market price. The C plaintiff also sought damages for severance loss and injurious affection on his land. The defendant denied trespass and stated that the structure, *ie*, the monsoon drain, was not a form of encroachment on the plaintiff's land. The defendant pleaded justification as it relied on its power to maintain, manage, build and improve monsoon drains in the Federal Territory of Kuala Lumpur, including on the plaintiff's land. The defendant further stated that D the plaintiff had not adduced any plans to develop the land and thus there was no necessity for the defendant to remove the monsoon drain. It would instead disturb the drainage system on the land, its surrounding area and the Federal Territory of Kuala Lumpur.

E **Held (allowing plaintiff's claim):**

(1) The most accurate plan was the one attached to the title, done by the Department of Survey and Mapping Malaysia ('JUPEM'), but it did not show the location of the monsoon drain on the plaintiff's land – just the plan of the land with the exact square feet that belonged to the plaintiff. F So, it could not be determined from the topography D14 or the plan attached to the land title, whether there were indeed monsoon drains on the plaintiff's land and how much of the plaintiff's land they had encroached. However, the land surveyor's ('PW3') maps in 2004 and 2013, made after conducting physical ground inspection and used scales for greater accuracy, showed where the monsoon drains were located on G the plaintiff's land and how much they had encroached unto it. The additional monsoon drain, as shown in the 2013 map, was not there when the land survey was conducted in 2004. Moreover, the monsoon drain was a man-made structure – rubble-pitching that was permanent in nature. Hence, the additional monsoon drain and the new slopes, H which had been built at the edge of the monsoon drain, had encroached unto the plaintiff's land. (paras 15-17)

(2) The defendant had agreed and admitted that the monsoon drain located on the plaintiff's land belonged to it. It was the defendant's I responsibility to ensure systematic waterflow of the drains and waterways to prevent floods, overflow and other catastrophes. Considering the fact that the statutory duties of the defendant included

the maintenance and improving of drains including those on the plaintiff's land and bordering it, it would be unacceptable to allow the defendant to conveniently disown/forgo the responsibility over it. Hence, the monsoon drain located on the plaintiff's land was the defendant's and there was encroachment on the plaintiff's land – to the measurement of 2,411sq feet. Additionally, to have constructed the monsoon drain, trespass by the defendant unto the plaintiff's land had occasioned. (paras 14, 23 & 24)

(3) The Street, Drainage and Building Act 1974 ('SDB') or any other legislation and regulation for that matter, could not override the rights of the plaintiff as guaranteed under the Federal Constitution. Reasonable notice must be given to landowners before the execution of the defendant's statutory duties. The defendant, although denied carrying out any surveillance or maintenance on the portion of the monsoon drain located on the plaintiff's land, confirmed by its letter dated 19 February 2008 to the plaintiff that the works were carried out at the location. The defendant had thus acknowledged and confirmed its presence on the plaintiff's land. However, the plaintiff had not received any reasonable notice, and therefore, the defence of justification could not be sustained. (paras 29 & 33-35)

(4) The SDB is clear and unambiguous. The requirement of reasonable notice is mandatory before entry into the owner's land is made to carry out any statutory duties. Otherwise, it is trespass. Trespass to land is actionable *per se* and continuing trespass would last as long as the monsoon drain remained on the plaintiff's land and it would only abate once the monsoon drain was removed. Based on the topography map, the position of the main monsoon drain on the plaintiff's land was where two other main drains meet and converge. Therefore, to remove or relocate it would disturb and disrupt the efficient flow of water. In the absence of any other suggestions or alternatives, it would not be in the public interest to have it removed or relocated from its current position. Therefore, to order the defendant to remove or relocate the main monsoon drain was unreasonable, inconvenient, impractical and unjust. (paras 36, 38, 43 & 44)

(5) While the plaintiff had bought the land with full knowledge of the location of the monsoon drain on his land, taking part of the plaintiff's land without the plaintiff's permission was not legally acceptable. The court thus ordered the defendant to acquire, from the plaintiff, the portion of land it had encroached at the prevailing market price. The court also allowed damages for as long as the trespass and encroachment were not addressed, at the rate of RM200 per day from 8 January 2008 until the date of this judgment. (paras 50-52)

A **Case(s) referred to:**
Azizah Zainal Abidin & Ors v. Dato Bandar Kuala Lumpur [1999] 5 CLJ 565 HC ***(dist)***
Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors [2022] 2 CLJ 1 FC ***(refd)***
Datuk Bandar Kuala Lumpur v. Nuzlaidi Mokhtar [2023] 1 LNS 908 HC ***(refd)***
Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd [2019] 1 CLJ 42 FC ***(foll)***

B **Legislation referred to:**
Evidence Act 1950, s. 83
Federal Constitution, art. 13
Local Government Act 1976, s. 2
Street, Drainage and Building Act 1974, ss. 50(1), 53, 54

C *For the plaintiff - Rajashree Suppiah, Amira Nur Nadia Azhar & Rex Kuan Kai Tat; M/s Rajashree*
For the defendant - Muhammad Nakhaie Ishak, Eizlan Azhar & Siti Nur Amanda Mizal Azman; M/s J Lee & Assocs

D *Reported by S Barathi*

JUDGMENT

Roz Mawar Rozain JC:

Introduction

E **[1]** The plaintiff, a 71-year-old owner of the land Geran 6462, Lot No 9891, Mukim Petaling, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur that measured 17,847sq feet initiated this action against the defendant for trespass and encroachment. There is a monsoon drain on his land that the plaintiff had claimed the defendant constructed without his
F permission to enter and build on his land. That had affected his legal rights to enjoy his land, as it is now smaller than what he had purchased it for. The plaintiff had repeatedly requested the defendant to move the structure built on his land. The defendant had failed to resolve the problem. The structure that had encroached upon his land and continuously trespass onto the
G plaintiff's land for the maintenance and improvement works on the monsoon drain had resulted in loss and damages which the plaintiff had suffered. The plaintiff pleaded that the defendant had taken part of the plaintiff's land for its purpose and use without compensation to the plaintiff which tantamount to illegal deprivation of the plaintiff's property.

H **[2]** The plaintiff prayed for this court's declaration that the defendant had trespassed onto his land and that there has been encroachment unto his land in the form of the monsoon drain. The plaintiff sought a mandatory injunction to order the defendant to remove the structure of the monsoon drain from his land within 14 days of the date of this court's order.
I Otherwise, the plaintiff sought for this court to compel the defendant to purchase the part of his land taken for the said structure of the monsoon drain

at the prevailing market price. The plaintiff also sought damages for severance loss and injurious affection on his land, which this court deems reasonable.

[3] The defendant denied that it had trespassed on the plaintiff's land and that the structure of the monsoon drain on his land is not a form of encroachment on the plaintiff's land. The defendant pleaded justification as it relied on its power to maintain, manage, build and improve monsoon drains in the Federal Territory of Kuala Lumpur, including the plaintiff's land.

[4] The defendant claimed that the monsoon drain is part of the drainage and/or the natural stream that existed on the land in 2004 or even earlier. The monsoon drain on the plaintiff's land is meant to provide a better and/or regular flow of water and it formed part of a more systematic and efficient drainage system in that area and in general the Federal Territory of Kuala Lumpur. The defendant contended that the drain that formed the waterway could not be closed or demolished arbitrarily as it would result in flash floods, soil erosion or cracks or deposits in that area and its surrounding areas, which would require alternatives for the waterway. The defendant pleaded that the existence of the monsoon drain on the plaintiff's land was necessary and for the public interest to avoid flash floods and the other said catastrophes. The monsoon drain ensured more systematic and efficient water drainage on the land, its surrounding area and in general the Federal Territory of Kuala Lumpur. The defendant pleaded that its actions were justified by law and that public policy offers it immunity from all tortious liabilities in the execution of its duties.

[5] In its defence, the defendant had pleaded that the plaintiff had not adduced any plans to develop the land and thus there was no necessity for the defendant to remove the monsoon drain. It would instead disturb the drainage system on the land, its surrounding area and the Federal Territory of Kuala Lumpur.

The Undisputed Facts

[6] The plaintiff owns the land since 6 April 2005. He had the intention to build a few bungalows as the land measures 17,847sq feet. But there was no evidence that the intention he had was put into motion – in fact there were no submissions of proposals by the plaintiff to develop the land for approval. The plan of the land was tendered that confirmed the location of the monsoon drain which is located at the border of the plaintiff's land and on one side, it had encroached onto the land – the breadth of the long monsoon drain had taken up the plaintiff's land. As per the plaintiff's letter of 8 January 2008, the structure of the monsoon drain had taken up almost 2,000sq feet of the plaintiff's land (according to the survey by PW3, the land surveyor, it was

A 2,411sq feet). This letter issued to the defendant had stated that at the material time, there were the defendant's contractors on his land that were carrying out the upgrading of the monsoon drain.

[7] The defendant explained in its letter of 19 February 2008 that the works undertaken on the monsoon drain on the plaintiff's land were for
B general repairs and maintenance to ensure that the water drainage worked well, and that there was no hindrance to the streaming of rainwater from the nearby reservoir. The defendant had made it clear from the outset that it was carrying out its functions under the Street, Drainage and Building Act 1974 to ensure that all waterways/drainage including those located on private land
C were functioning properly to prevent any catastrophes or inconvenience to all inhabitants in the area. At that point in time, the defendant informed the plaintiff that there did not seem to be any urgency or necessity to remove or relocate the said monsoon drain.

[8] Thereafter, on 9 July 2014, armed with a land survey conducted on
D 9 November 2013, the plaintiff wrote again to the defendant on the encroachment by the structure of the monsoon drain that resulted in his land becoming smaller. The plaintiff suggested a resolution whereby the defendant procured the whole land from him at the prevailing market rate in the sum of RM4,238,280. The defendant had not responded to this, so in December
E 2014, the plaintiff wrote another letter to the defendant that stated the result of a discussion with an officer of the defendant on 22 December 2014. The plaintiff confirmed that he was informed that the monsoon drain could not be removed or relocated, and as such, the defendant ought to buy the whole land. The plaintiff requested for discussions to commence to resolve the
F problem soonest.

[9] The defendant did not respond to the plaintiff's request. The next correspondence was on 11 July 2018, where the plaintiff forwarded to the defendant the pictures of the monsoon drain which had encroached on his land. To the request that the monsoon drain be removed, the defendant
G replied on 7 August 2018 that the natural stream had long existed on the plaintiff's property. So, the proposal to remove/relocate the waterway and drainage was to be studied and discussed by the defendant that involved its consultant engineers and internal committees.

[10] Then, on 19 September 2018, the defendant informed the plaintiff that
H a visit to the plaintiff's land and a survey of the monsoon drain were undertaken. It was found that the structure of the monsoon drain was not built by the defendant, it had long existed and is 'rizab parit induk' (reserved main monsoon drain).

[11] The last correspondence from the plaintiff was on 4 February 2019,
I when he complained to the defendant of the trespass onto his land and litter in connection to the monsoon drain. There was no response from the defendant and thus, letters of demand were issued by the plaintiff's solicitors prior to the commencement of this action.

[12] At the trial, the plaintiff testified and called the Deputy Director General of the Land Office and the Land Surveyor he had appointed. The defendant's three witnesses comprised of its two engineers and the Director of Data Geospatial at the Cartography Division from the Headquarters of Department of Survey and Mapping Malaysia (JUPEM).

The Assessment Of The Evidence

Encroachment

[13] It can be concluded with great certainty that the location of the monsoon drain is within the plaintiff's land. The plaintiff did not consent to this. The defendant had failed to adduce any evidence to show otherwise. At the opposite, the defendant had full knowledge of this fact as per their acknowledgment of the location of the monsoon drain in the plaintiff's land *vide* its letter dated 8 February 2008. There was also no challenge as to the amount of land that the monsoon drain had encroached onto the plaintiff's land which this court takes as 2,411sq feet.

[14] The point of quarrel that the defendant had taken up at trial was the contention that they had not constructed the monsoon drain and all three witnesses called by the defendant had contended that they had no knowledge of who had constructed it. However, this goes against the agreed facts filed for this case which stated that "terdapat sebuah parit ("monsoon drain") kepunyaan defendan yang berada di atas tanah tersebut ("struktur yang menceroboh")". The defendant had agreed and admitted that the monsoon drain located on the plaintiff's land belonged to it. At trial, witnesses for the defendant claimed that the monsoon drain had been in existence long before the plaintiff had purchased the land. There were attempts by the defendant through its witnesses, to disassociate itself from the accountability of having constructed the drain and claiming ownership and responsibility over it. So, the about-turn taken at trial was not only unfair to the plaintiff but showed the uncertainty of the defendant's position.

[15] Furthermore, the defendant could not rebut the plaintiff's evidence adduced by the plaintiff's third witness (PW3) – the land surveyor. He had undertaken to survey the plaintiff's land in 2004 and 2013 and accordingly produced the plans of both works – P15 and P4 respectively. Both plans and drawings show the monsoon drain located at the perimeter and inside the boundary of the plaintiff's land. However, in 2013, there was an additional monsoon drain running on the southern land of the perimeter which was not there in the 2004 plan. There are slopes which had been built at the edge of the monsoon drain – all of which had encroached into the plaintiff's land. PW3 testified that he had done a ground survey and confirmed that there was no additional monsoon drain when he first conducted the survey back in 2004. PW3's conclusion was a result of a physical examination on the ground as opposed to the topography of D14 which was conducted by aerial

A photogrammetry where the photos were taken quite high up with old technology. This court heard that there could easily be differences of a few metres. This court accepts the testimony of PW3 and finds on a balance of probabilities the most accurate plan is the one attached to the title which was done by the Department of Survey and Mapping Malaysia (JUPEM) but it
B does not show the location of the monsoon drain on the plaintiff's land – just the plan of the land with the exact square feet that belonged to the plaintiff. So, it cannot be determined from the topography D14 or the plan attached to the land title, whether there were indeed monsoon drains on the plaintiff's land and how much of the plaintiff's land they had encroached.

C **[16]** On the other hand, the plans that PW3 had undertaken – both in 2004 (P15) and 2013 (P4) show the location of the monsoon drains on the plaintiff's land at that particular point in time respectively. Although the topography D14 showed that there was a blue line indicating 'saliran' but it did not specify what it was – whether an earth drain or a large monsoon drain
D or even a natural stream, and most importantly, it did not accurately pinpoint whether it was located in the plaintiff's land. Therefore, this court is satisfied on a balance of probabilities that PW3's maps both 2004 (P15) and 2013 (P4) for comparison, showed where the monsoon drains are located on the plaintiff's land and how much they had encroached unto it. The maps were
E done after conducting a physical ground inspection and used scales for greater accuracy.

[17] This court accepts that the additional monsoon drain that thereafter existed at the southern perimeter of the plaintiff's land as shown in the 2013 map (P4) was not there when the land survey was conducted in 2004.
F Moreover, the monsoon drain was a man-made structure – rubble pitching that is permanent in nature as testified by DW2 (the defendant's retired senior assistant engineer). The defendant had in 2008 confirmed that it was under the control and management of the defendant's Department of Drainage and River Management. PW3 was able to inform the court of the
G size of the drain which measured 3.5 metres in width. This additional monsoon drain had encroached unto the plaintiff's land approximately 2,411sq feet. The new slopes which have been built at the edge of the monsoon drain had also encroached unto the plaintiff's land.

[18] The plaintiff had called the Senior Deputy Director from the land
H office (PW2), who had informed this court that records show that the land was first acquired in 1906 but eventually became Geran 6462, that was registered in 1982. That meant the land was properly measured and the measurement of the area was finalised. The land title had no easement registered on it. Neither did the title contain any drains on it.

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[19] The Director of Cartography and Geospatial Data of JUPEM (DW1) testified for the defendant to explain the topography of D14, which was done in 1992 that used three-dimensional photos taken from the air by photogrammetry. The verification was completed in 2003. He had confirmed that he had not visited or sighted the plaintiff's land and that he was not asked by the defendant to measure or conduct a physical survey of the plaintiff's land which is the subject matter in question. He was also not informed by the defendant when the said monsoon drains were built. DW1 testified that there was no survey conducted or plans made to illustrate the condition of the plaintiff's land in 2004.

[20] Based on the topography of D14, DW1 was unable to confirm what the blue line that indicated 'saliran' actually was. He testified that 'saliran' featured a hydrographical element that could be a ditch, drain, waterway, canal *etc*. The blue line that depicted 'saliran' according to DW1, could be a natural stream or manmade monsoon drain, of which the topography of D14 cannot assist in coming to a finding. It was the evidence of DW1 that the 'saliran' recorded in 1992, if a natural stream or waterway, could also change due to climate and geo-changes over a period of time. This court finds that it could not be concluded that the 'saliran' was actually the monsoon drain located on the plaintiff's land. Particularly so when there is no other evidence to back up the defendant's claim that the monsoon drain had long existed prior to the plaintiff's acquisition of the land. The evidence that can be relied on by this court is the 2013 map (P4) which showed that the monsoon drains as opposed to none in the 2004 map (P15). This fact was affirmed by DW1 and DW2 as well. The defendant was not able to produce any documents or records that showed the monsoon drain was constructed prior to 2004 (south of the plaintiff's land).

[21] During the submissions, the defendant's counsel cited s. 83 of the Evidence Act 1950 requiring this court to presume that the topography D14 made by JUPEM was accurate. Though it may be so, the topography (and also the defendant's witnesses) was unable to confirm what the blue line represents, nor whether it was located within the plaintiff's land.

[22] This court concludes based on the evidence that on a balance of probabilities, the plaintiff had indeed purchased the land that measured 17,847 sq feet and that the monsoon drain as illustrated in the 2013 map (P4) was not there when he first purchased it. Be that as it may, on a balance of probabilities, this court is satisfied with the evidence that the monsoon drain in the plaintiff's land had taken up 2,411sq feet without his permission.

[23] DW3, the civil engineer in the defendant's Department of Infrastructure Planning, confirmed that it was the defendant's responsibility to ensure systematic waterflow of the drains and waterways to prevent floods, overflow and other catastrophes. DW3 stated that it was initially a

natural stream that became a main drain which had long existed on the plaintiff's land. But apart from stating so, there was nothing else to satisfy this court that the drain was not the defendant's. In the cross-examination, the plaintiff had admitted that although he had not seen the defendant building the drain, he had seen them maintaining it. There was no evidence of who had built this rubble-pitching structure, but it was most certainly not the plaintiff. Considering the fact that the statutory duties of the defendant include the maintenance and improving of drains including those on the plaintiff's land and bordering it, it would be unacceptable to allow them to conveniently disown/forgo the responsibility over it.

[24] So, based on the above facts, this court finds that the monsoon drain located in the plaintiff's land is the defendant's. It mattered not whether it had derived from a natural stream, the unshaken fact remained that what is now on the plaintiff's land is a concrete man-made structure which is the monsoon drain under the purview and jurisdiction of the defendant. On a balance of probabilities, this court further finds that there was encroachment on the plaintiff's land – to the measurement of 2,114sq feet. Additionally, to have constructed the monsoon drain, trespass by the defendant unto the plaintiff's land had occasioned.

[25] This court will not address the setback boundary that affects the plaintiff's land due to the TNB pylon but just the portion that the monsoon drain took up of the plaintiff's land. In any event, this was not a pleaded defence of the defendant. This court finds that it was irrelevant to the plaintiff's claim against the defendant. It mattered not which other party had affected the plaintiff's enjoyment of land. This case was to adjudicate whether the defendant had indeed encroached upon the plaintiff's land and if so, the redress required to resolve the breach.

Defence Of Justification

[26] As the local authority of Kuala Lumpur (s. 2 of the Local Government Act 1976), the defendant had premised all its actions pertaining to the monsoon drain on/bordering the plaintiff's land with reference to its statutory powers under the Street, Drainage and Building Act 1974 (SDB). The specific provisions are s. 53 and s. 54 that respectively provide:

> **Local authority to repair and alter and may discontinue surface and storm water drains, *etc***
>
> 53(1) The local authority shall maintain and keep in repair and, as it sees fit, enlarge, alter, arch over or otherwise improve all or any of the surface and storm water drains, culverts, gutters and water-courses under the control of the local authority and may discontinue, close up or destroy such of them as it deems useless or unnecessary:

Provided that the local authority shall before entering any private property for the purpose of carrying out any work under this subsection, give reasonable notice in writing in that behalf, and shall in carrying out such works do as little damage as may be and shall make full compensation for any damage done.

Not to cause nuisance

(2) The discontinuance, closing up or destruction of any of them shall be done as not to create a nuisance.

(3) If by reason thereof or of any such alteration as hereinbefore mentioned any person is deprived of the lawful use of any surface and storm water drains, culvert, gutter or water-course, the local authority shall with due diligence provide some other as effectual as the one of which he is so deprived.

Cleansing and emptying surface and storm water drains *etc*

54(1) The local authority shall cause the surface and storm water drains, culverts, gutters and water-courses under the control of the local authority to be so constructed, maintained and kept as not to be a nuisance or injurious to health and to be properly cleared, cleansed and emptied and, for the purpose of flushing, cleansing and emptying the same, it may construct and place, either above or underground, such reservoirs, sluices and other works as are necessary:

Provided that the local authority shall, before entering any private property for the purpose of carrying out any work under the subsection, give reasonable notice in writing in that behalf, and shall in carrying out such work do as little damage as may be and shall make full compensation for any damage done.

(2) The local authority may, with the sanction for the State Authority, cause all or any of such surface and storm water drains, culverts, gutters and water-courses to communicate with and be emptied into the sea or other fit place, or may cause the refuse from the same to be conveyed by a proper channel to the most convenient site for its deposit, and may sell or otherwise dispose of the said refuse for any agricultural or other purposes as are deemed expedient so that it shall not become a nuisance.

[27] The facts in the case of *Azizah Zainal Abidin & Ors v. Dato Bandar Kuala Lumpur* [1999] 5 CLJ 565; [1999] 5 MLJ 405 which the defendant had referred to, are starkly in contrast with those here. In that case, the defendant had produced notice which had informed the plaintiff comprehensively of the proposed works that were carried out together with the law. There were also meetings where the job carried out by the defendant was explained and elaborated prior to the execution thereof. Notice there were reasonably given. There were none here.

[28] The law that the defendant relied on – s. 53 of the SDB requires the defendant to issue reasonable notice to the plaintiff before the entry onto his land for the purposes of any work. The defendant submitted that the encroachment of the monsoon drain unto the plaintiff's land could only be considered trespass if it was an unjustifiable intrusion. The defendant premised their entry lawful based on their statutory duty and submitted that the claim for trespass must fail.

[29] This court agrees with the plaintiff's submissions that SDB (or any other legislation and regulation for that matter) cannot override the rights of the plaintiff guaranteed by our Federal Constitution. In this instance, the law provides that reasonable notice must be given to landowners before the execution of the defendant's statutory duties. There was no evidence of any notice in relation to the defendant's statutory duties over the monsoon drain.

[30] DW2 claimed that he had visited the monsoon drain on the plaintiff's land once a year from 2012 to 2017, which was according to the standard operating procedure (SoP) of the defendant. He found that all were functioning well and in place. There were also no complaints in relation thereto. Thereafter, from 2018 onwards, the defendant's SoP required monitoring of the monsoon drains twice yearly.

[31] As to maintenance work, DW2 testified that from 2012 to 2017, he did not carry out any on the monsoon drain on the plaintiff's land. The explanation given was that the defendant did not carry out annual maintenance work but only when problems arose when there were obstacles to the water flow or if the sides/walls of the drains collapsed or if there were disturbances or obstructions to the water flow and the main monsoon drain. However, DW2 testified that the maintenance work on the main monsoon drain on the plaintiff's land took place in 2017.

[32] Pertaining to the entry into the plaintiff's land for the purposes of surveillance, visits, monitoring, and maintenance, DW2 explained that no notices were addressed to the plaintiff as the defendant had not entered onto the plaintiff's land. Instead, he claimed to have visited or dealt with the other part of the monsoon drain that was not located on the plaintiff's land. DW2 denied that the defendant had built or constructed the monsoon drain. He was unsure whether any permission or request was issued to the plaintiff in relation to any works conducted throughout the years.

[33] It is quite perplexing that the defendant contended no maintenance and surveillance was conducted on the monsoon drain that had encroached the plaintiff's land when at all material times they took the position that they were empowered statutorily to maintain the drain and all drains in the Federal Territory of Kuala Lumpur including the monsoon drain on the plaintiff's land. It was impressive that the monsoon drain located on the plaintiff's land and bordering its perimeters was crucial, critical and

necessary for the public interest. Yet, the defendant claimed that it had not carried out any surveillance or maintenance on the portion of the monsoon drain that was located on the plaintiff's land to affirm its denial that it had entered the plaintiff's land.

[34] On a balance of probabilities, this court is unable to accept the defendant's contention. The defendant's letter of 19 February 2008 that responded to the plaintiff confirmed that the works were carried out at the location of the monsoon drain:

> Adalah dimaklumkan bahawa pihak Jabatan ini memang benar sedang melaksanakan kerja-kerja penyelenggaran Longkang Tepi Jalan yang sedia ada di lokasi yang dimaksudkan oleh pihak tuan di dalam surat seperti di atas.
>
> Kerja-kerja penyelenggaraan yang dilaksanakan ke atas longkang sedia ada melibatkan kerja pembaikan pulih dan penyelenggaraan am untuk memastikan Saluran Air tersebut berfungsi sebaiknya dan tidak menghindar sebarang kelancaran pergerakan air hujan dari kawasan tadahan di lokasi berkenaan. Tindakan ini adalah selaras dengan fungsi Jabatan dan pihak Dewan Bandaraya Kuala Lumpur yang diperuntukkan di dalam Akta Jalan, Parit dan Bangunan 1974 untuk memastikan Saluran Air di atas Resab Longkang, Resab Kerajaan atau Tanah Persendirian befungsi sebaiknya untuk mengelak sebarang bencana atau kesulitan penduduk di Kawasan terlibat.

[35] The defendant thus acknowledged and confirmed its presence on the plaintiff's land. For the man-made rubble-pitching monsoon drain located on the plaintiff's land, there definitely must be entry upon the plaintiff's land. Likewise, for the inspection and surveillance and most certainly maintenance and improvement work on the monsoon drain as it was well located within the plaintiff's land – in the measurement of 2,411sq feet. The plaintiff had not received any reasonable notice and had complained that he had seen the defendant's contractors/agents on his land attending to the monsoon drain. In the absence of reasonable notice to the plaintiff, this court finds that the defence of justification could not be sustained.

[36] This court is bound by the decision of the Federal Court in *Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd* [2019] 1 CLJ 42; [2019] 1 MLRA 255. Individual property rights under art. 13 of our Federal Constitution were recognised and that no law was to be construed to allow any party to enter a person's land without consent. In this case, SDB was clear and unambiguous. The requirement of reasonable notice is mandatory before entry into the owner's land is made to carry out any statutory duties. Otherwise, it is trespass.

[37] Respectfully, the excerpt of the Federal Court's decision at p. 54 (CLJ); p. 265 (MLRA) is borrowed and applied here:

A Put simply, trespass onto land is the unlawful direct and immediate interference with the possession of land which is in the possession of another person, or which another person is entitled to possession. A Latin maxim is frequently employed to define the extent of land: '*cui us est solum, eius est usque ad coelum et ad inferos*' – he who owns the land, owns it all the way to heaven and to hell. This principle is often referred to in its
B abbreviated form *as ad coelum* principle. In modern law, this principle is still accepted in limited form, and rights are divided into space rights and subsurface rights below.

[38] The principles of continuing trespass and encroachment are well iterated in the decision of the Federal Court in *Bayangan Sepadu Sdn Bhd*
C *v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors* [2022] 2 CLJ 1; [2022] 2 MLRA 1. Trespass to land is actionable *per se* and continuing trespass will last as long as the monsoon drain remains on the plaintiff's land and it will only abate once the monsoon drain is removed.

D **[39]** The law in s. 50(1) of the SDB provided that DBKL may request the State Authority to acquire the plaintiff's land as the monsoon drain is located therein. It could be the portion affected or the whole land but for reasons only known to them, they did not do so.

Necessity/Public Interest

E **[40]** In addressing the plaintiff's prayer for an order to remove or relocate the monsoon drain, evidence adduced at trial is considered. This court heard the testimonies of all the witnesses and found that the monsoon drain became a main monsoon drain. According to the evidence, it functions as the main place where water/runoff water like rain pools before being channelled to
F rivers. It is the main drain out of a network of drainages to dispel and channel water to the rivers for Kuala Lumpur.

[41] This court accepts the explanation by the defendant's witnesses that the drainage in Kuala Lumpur accorded to the principle where water flows from high ground to low ground. From the topography map D14, it can be
G seen that water collects at higher land in Taman Overseas Union Garden (OUG) and flows to the lower land in Taman Yarl through a system of drain network. The main monsoon drain on the plaintiff's land is part of the main drains. It functions as a collector of water surface and runoff, not only as a collector from the housing areas but also water from other sources that pool
H into the reservoir for the drainage network of OUG and Taman Yarl. The main monsoon drain channels and releases the water into Klang River through other main monsoon drains, which all form a network of drains for OUG, Taman Yarl and Kuala Lumpur. So, the purposes of the main drain are two-fold, to channel and release the water into Klang River, and also to
I prevent flash floods. The latter would result in soil erosion.

[42] As per the maps of 2004 (P15) and 2013 (P4), DW2 confirmed that the topography of the land is that the part that faces Jalan Awan Sari is flat whilst that at the side of Taman OUG is higher than the rest of the land. He claimed that the monsoon drain formed the main drain with the approximate size of 2 metres in width and 1.5 metres in height. The monsoon drain was of 'rubble-pitching' structure made from granite to prevent erosion at the side of the drain as a result of constant water flow. DW2 confirmed that there was always water flow through it as it is the main water flow to channel the water and runoff water from Taman Yarl and Taman OUG.

[43] Based on the topography map, the position of the main monsoon drain on the plaintiff's land is where two other main drains meet and converge. Therefore, it is very critical. To remove or relocate it would disturb and disrupt the efficient flow of water. In the absence of any other suggestions or alternatives, this court finds that it would not be in the public interest to have it removed or relocated from its current position even though it has encroached upon the plaintiff's land. Even the plaintiff in cross-examination had agreed that the water flows through that monsoon drain from the higher land to the lower land and is connected to another monsoon drain, and later discharged into the river. The plaintiff had confirmed that there were no flash floods that occurred on his land since he had owned it.

[44] Premised on the evidence adduced at trial, to order the defendant to remove or relocate the main monsoon drain is unreasonable, inconvenient, impractical and unjust. DW2 confirmed the necessity of the said main monsoon drain on the plaintiff's land. Hence, this court will not order for the monsoon drains located onto the plaintiff's land and bordering it to be removed or relocated. The basis is public interest. Accordingly, there must be other means of resolution to this matter.

Other Issues

[45] There were a few other issues raised during arguments. No evidence was led on the issue of limitation which was pleaded in the defence. In any event, the encroachment is of a permanent nature up to now and the trespass is a continuing one.

[46] There was also the issue of the monsoon drain being a pre-existing natural stream. To this court's considered view, regardless of whether that is true – the issue is the man-made structure that is located on the plaintiff's land which is under the jurisdiction and purview of the defendant. The plan attached to the title did not show any structure when the plaintiff purchased it. The measurement of land is deemed accurate but in 2013, the land survey reflected the changes and the trespass unto it. Consent must be obtained from the plaintiff which was not – see *Datuk Bandar Kuala Lumpur v. Nuzlaidi Mokhtar* [2023] 1 LNS 908; [2023] MLRHU 768.

[47] As to the issue of the defendant's classification of the monsoon drain as 'rizab parit induk' or the main reserved drain, DW1 was questioned on the defendant's response in September 2008 to the plaintiff that based on a search of the master plan at the Infrastructure Department, there is a line of ditches that have been built for a long time that are the main ditch reserve. DW1 testified that there is a database – 'Pengkalan Data Ukur Kadaster Berdigit Kebangsaan' which is relied on by the land office to issue the official plans attached to grants and title deeds. The database stores reserved open spaces which are reserved land only or those land that have not been granted ownership/titles. When the plan shows numbers that means those lots/lands have been granted title to the owners. In respect to the plaintiff's land, DW1 confirmed that there were no reserved open spaces (be it for the use of the defendant). It is the evidence of DW1 that the information in the defendant's said letter was not true. DW1 confirmed that the monsoon drain built was not on easement or reserved open space and admitted the encroachment on the plaintiff's land. DW2 was unable to confirm the records from which the defendant had taken the position that the monsoon drain was a reserved main drain. On the opposite, DW2 testified that there were no records that the monsoon drain on the plaintiff's land was classified as a reserved main drain although he had confirmed the necessity of the said main monsoon drain on the plaintiff's land.

[48] DW2, the retired senior assistant engineer with the defendant who was in charge, amongst others, of the drains on the plaintiff's land from 2012 to 2017, was called to testify that the monsoon drain located on the plaintiff's land was categorised as the reserved main drain. This evidence is not in tandem with the testimony of DW1. At the trial, DW2 was unable/failed to produce any evidence to show that the monsoon drain located on the plaintiff's land was indeed the reserved main drain.

[49] This court concludes that the monsoon drain, even when it cannot be proven that it is a reserved main monsoon drain, it still ought not to be removed or relocated due to public interest.

Remedy

[50] The plaintiff had bought the land with full knowledge of the location of the monsoon drain on his land. He testified that he saw the monsoon drain as well as a TNB pylon. He had thought that the monsoon drain was located outside his land – bordered it but was not on part of it. He did not conduct any other due diligence on whether what he purchased was indeed the same square feet as that stated on the sale and purchase agreement. He had inquired whether there were any encumbrances on the to which he found there were none. The title showed that the land was first registered in 1982 – there is no evidence on whether the monsoon drain had existed since then. What is certain is that when the plaintiff purchased the land in 2005, the monsoon drain was already in place on the land.

[51] However, taking part of the plaintiff's land without the plaintiff's permission is not legally acceptable. This court orders that the defendant acquire from the plaintiff the portion of land (2,411sq feet) it had encroached at the prevailing market price. If the defendant requires easement and will need to work on more portion of the plaintiff's land, then it is ordered that it acquires that part too. This would resolve further issues that arise concerning the monsoon drain from hereinafter. It would also remedy the plaintiff's predicament as well as preserving public interest in maintaining the monsoon drain there.

[52] This court also allows the plaintiff's prayer for damages at the rate of RM200 per day. The plaintiff had, *vide* its letter dated 19 March 2001, notified the defendant of the claim of RM200 per day for as long as the trespass and encroachment were not addressed. The defendant had failed to address this even at trial. As such, this court is minded to award the plaintiff damages at the rate of RM200 per day from 8 January 2008 until the date of this judgment for damages. That would amount to RM200 multiplied by 5,757 days which amounts to RM1,151,400. This court is of the considered view that the said rate is reasonable. Interests of 5% shall be imposed on this judgment sum from today until the date of full and final settlement.

[53] Costs of RM45,000 which this court deems reasonable is to be paid by the defendant to the plaintiff. The defendant could have avoided these legal proceedings if it had engaged with the plaintiff prior to this suit.